NO. 20182

In The

UNITED STATES COURT OF APPEALS

for the Ninth Circuit

MADELINE CURRY, ADMINISTRATRIX OF THE ESTATE OF JACK CURRY, DECEASED,

Appellant,

vs.

FRED OLSON LINE, a corporation, A/S GANGER ROLF, A/S BORGA and A/S BONHEUR,

Appellees.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

In this Reply, we have endeavored to reduce Appellees' argument to what we conceive its basic contentions to be, and then reply to them. At the outset, we do not think that Appellees have in any real measure joined issue with us, or reached the basic question before the Court.

I

CALIFORNIA LABOR CODE SECTION 2803, UPON WHICH APPELLEES' ENTIRE ARGUMENT IS BASED, IS COMPLETELY IRRELEVANT TO THIS CASE.

After reading Appellees' brief, we find ourselves like Don Quixote, jousting with wind mills. Where is reality, and where is fiction? Where is fact, and where is fancy? For Appellees' entire argument is directed to non-existent propositions.

Injected into the case by Appellees is Labor Code Section 2803 which forms the basis for a tortuous argument that "want of ordinary or reasonable care" resulting in death is the standard to be employed in an industrial death case, which standard it is argued precludes application of the seaworthiness rule with its absolute liability impositions.

This provision of law is completely unrelated to our case. Section 2803 is part of a legislative scheme which must be read and applied in conjunction with the California Workman's Compensation Act, Labor Code Secs. 3201 *et seq.* It comes into play in only those employer-employee situations where the death is not covered by the Compensation Act, as where certain employees are excluded from coverage, or the employer has failed to provide insurance to cover work incurred injuries or deaths. An action for damages may then be brought under Sec. 2803. Such instances are minute in number. The vast majority of death cases arising in the employer-employee relationship are covered by the Compensation Act where the employer is liable even though wholly free from fault, but only for compensation.

That Section 2803 cannot apply in our case is self-evident. Ours is a situation where the decedent, if killed ashore, would have been covered by the state Workmen's Compensation Act, and since he was killed aboard a vessel in a state harbor, his widow's rights as against the decedent's employer are protected by the Longshoremen and Harbor Worker's Compensation Act, 33 U.S.C. Secs. 901 *et seq.*

But Appellant here seeks no remedy against her deceased husband's employer. She seeks redress from a *third party tort-feasor,* the Appellee shipowners, which right is expressly reserved to her by Section 33 of Title 33 U.S.C. She has asserted that right pursuant to the state enabling statute which provides the remedy, C. C. P. Sec. 377. The general maritime law of the United States provides the substantive basis for her claim and the rules which determine its disposition, including her right to assert the doctrine of unseaworthiness.

We find no need to repeat in any detail the argument of our opening brief or the cases there cited. Suffice, we argue that California courts presumably would construe Section 377 as did the Court of Appeals for the Third Circuit the New Jersey Act in *Skovgaard vs. The M/V TUNGUS* (3 Cir. 1958) 252 Fed. 2d 14, 1958 A.M.C. 619, p. 622,

> "The conduct required to impose liability * * is not limited to that conduct embraced in the historical concept of negligence. The words ("wrongful act, neglect or default") encompass something more. * * * The seaman possesses the legal right to a seaworthy ship. Whenever

> this legal right is infringed and harm results by reason of the ship being unseaworthy, a 'wrong' occurs, whether it be of omission or commission. * * * *Culpability is not necessary to constitute a wrong. It is the liability-creating quality of an act which makes it wrongful."* (Our emphasis.)

It should now be evident that federal maritime law controls the substantive rights here being asserted. As we previously noted, Mr. Justice Brennan, speaking for the four dissenting judges said in *M/V TUNGUS vs. Skovgaard* (1958) 358 U. S. 588, p. 608,

> "It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care. * * * When the injured party seeks to enforce a 'state created remedy' for the breach of the federally defined duty owing to him, 'federal maritime law would be controlling.'"

That this is clearly the present state of the law we turn to Mr. Justice Whitaker's dissenting statement in *Goett vs. Union Carbide* (1960) 361 U. S. 340, p. 346,

> " * * * The substantive legal rights and liabilities involved in this admiralty case are not in any true sense governed by West Virginia law, but rather, are within the full reach of exclusive admiralty jurisdiction and are to be measured by the standards of the general maritime law * * as *remedially* supplemented by the West Virginia Wrongful Death statute. * *
>
> "And when in a case encompassed by the terms of the State's Wrongful Death statute, admiralty 'adopts' such statute, it does so only to afford a *remedy* for a substantive cause of action created by the maritime law which, 'if death had not ensued', would have redressed it.

Justice Whitaker was one of the majority in *TUNGUS*. His views coupled with those of Justice Brennan for the dissenters are definitive of the matter absent a precise ruling in clarification of the original *TUNGUS* decision.

II

APPELLEES' ARGUMENT IS NOT CONCERNED WITH THE CALIFORNIA WRONGFUL DEATH ACT'S INCLUSION OF A SEAWORTHINESS CAUSE OF ACTION, BUT CLAIMS THAT DECEDENT"S NEGLIGENCE DISPOSES OF THE CASE, WHICH IS NOT THE FACT.

Further confusing the matter, Appellees have posed the wrong question to this Court. It is not, as Appellees would have it, "whether under the law of California, the heirs of a longshoreman found by the jury to have died as a result of his own negligence would be entitled to recover damages for his death on the ground of unseaworthiness", but rather whether the California Wrongful Death Act encompasses an action for death caused by unseaworthiness of a vessel, and whether a litigant who pleads such a count is entitled to have it determined on the merits.

Whether decedent was guilty of negligence is totally unrelated to the unseaworthiness question. It is settled law that a maritime tort action may proceed on two separate counts, negligence and unseaworthiness. *Balado vs. Lykes Bros.* (2 Cir. 1950) 179 Fed. 2d 943. The evidence may support recovery on one or both grounds, or none. *McCarthy vs. American Eastern Corp.* (3 Cir. 1949) 175 Fed. 2d 724.

But the considerations which support the theories may be at variance, as in a case like ours where the claim was made that the deck area was "slippery and unsafe to walk upon" causing decedent's fall. (Tr. p. 2). On a negligence count, proof of knowledge, or at least the opportunity to know of a dangerous situation, must be established against the shipowner to fasten liability upon him. Impositon of unseaworthiness requires no such proofs.

> " * * * The *shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability.* * * * There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. *What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence.* To hold otherwise now would be to erase more than just a page of history."
>
> Mr. Justice Stewart writing the Court's opinion in *Mitchell vs. Trawler Racer Inc.* (1959) 362 U. S. 539, 550, 1960 A.M.C. 1503. (Our emphasis.).

In almost any maritime tort action, and particularly in a slip and fall case, like ours, the possibility of both negligence and unseaworthiness exists. *Krey vs. United States* (2 Cir. 1941) 123 Fed. 2d 1008, 1942 A.M.C. 19, and see *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 Yale Law Journal 243, pp. 251-256. *Cf. Mahnich vs. Southern S. S. Co.* (1944) 321 U. S. 96.

There may be no negligence, but there may still be unseaworthiness. *Sulovitz vs. United States* (E.D. Pa. 1945) 64 F. S. 637, 1945 A.M.C. 1467, 1473, where such findings were expressly made. And there may be no negligence on the part of the shipowner coupled with contributory negligence of the injured worker proximately contributing to the accident, but there may still be unseaworthiness. *Cf. Holley, Admx. vs. S. S. MANFRED STANSFELD* (4 Cir. 1959) 269 Fed. 2d 317, 1959 A.M.C. 2189.

In the case at bar, assume that the shipowner was not negligent because it neither knew or had the opportunity to know of the slippery and unsafe condition. Assume, further that such condition existed. Assume further, that plaintiff was guilty of contributory negligence. The vessel owner could still be liable on the basis of unseaworthiness, predicated on the fact that there was in fact a slippery and unsafe condition which caused injury. Nothing more need exist to bring the unseaworthiness doctrine into play. This Court has so held.

" * * * It is now established law that a shipowner is liable to a stevedore loading its vessel if it be unseaworthy as to its decks by the presence thereon of sufficient oil or grease to make it slippery to one walking over it, and the stevedore is injured thereby. The liability exists although the shipowner has no knowledge of the presence of the oil or grease." *Yanow vs. Weyerhaeuser S. S. Co.* (9 Cir. 1957) 250 Fed. 2d 74, 1958 A.M.C.

516, p. 517. And see *Johnson Line vs. Maloney* (9 Cir. 1957) 243 Fed. 2d 293, 1957 A.M.C. 1138; *Mitchell vs. Trawler Racer Inc., supra; and Alaska Steamship Co. vs. Petterson* (1953) 347 U. S. 396, affirming this Court, 205 Fed. 2d 478, 1953 A.M.C. 1405.

Turning now to our case: the presence of a slippery substance of sufficient quantity making an unsafe working place constitutes unseaworthiness. The only role that decedent's contributory negligence has in the case would be to reduce the recoverable damages according to the maritime tort rule of comparative negligence. *Holley, Admx. vs. S. S. MANFRED STANSFLED, supra.*

It was manifest error by the District Court to grant a partial summary judgment for Appellees on the unseaworthiness count, and thereby deny Appellant a trial on the merits of such claim. *Cf. Jacob vs. City of New York* (1941) 315 U.S. 752.

III.

UNSEAWORTHINESS IS ACTIONABLE UNDER THE CALIFORNIA WRONGFUL DEATH ACT CONTRARY TO APPELLEE'S CLAIM THAT UNSEAWORTHINESS SOUNDS IN CONTRACT, AND THEREBY IS NOT ACTIONABLE.

Insofar as the California Wrongful Death Act covers only actions sounding in tort, no inhibition constrains an unseaworthiness cause. Appellees contend that such a claim is grounded in contract, and therefor is not actionable under the Act. Not so.

We discussed this point in our Opening Brief, pp. 25-26. Although there is discussion in the cases that the right to a seaworthy vessel is an "incident of the seaman's contract", it is now settled beyond question that such right is a "relational" duty owed by the shipowner to the seaman (or longshoreman doing "seaman's work") and existing over and above strict contractual obligation.

The Supreme Court gave full answer to Appellees' contention in *Seas Shipping Co. vs. Sieracki* (1946) 328 U. S. 85, p. 93,

> "Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative the importation of those common law tort limitations (contributory negligence, assumption of risk, negligence of a fellow servant) *does not mean, however, that the liability is itself contractual* or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owner. *That the liability may not be either so founded or so limited* would seem indicated by the stress the cases uniformly place upon its *relation*, both in character and in scope, to the *hazards* of marine service which unseaworthiness places on the men who perform it. * * *
>
> "The hazards which maritime service places upon men who perform it, *rather than any consensual basis of responsibility*, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character." (Our emphasis.)

The shipowner's liability to seamen for unseaworthiness is rooted in their *relationship and the hazards of maritime service, not in any contract between them*, written or consensual. Unseaworthiness is a tort. Of that there can be no further question.

Sieracki gives the full and final answer to that proposition. Other Courts have given like reply.

"If it be said that the New Jersey (Wrongful Death) Act provides redress for tortious conduct alone, we answer that providing an unseaworthy ship is a tort." *Skovgaard vs. M/V TUNGUS* (3 Cir. 1957) 252 Fed. 2d 14, 1958 A.M.C. 619, 623.

" * * * The breach of the obligation to furnish a seaworthy ship is a tort; and that is a result consonant with the historical attitude toward breaches of warranty, which until 1778 had to be sued in tort, and which may be still so treated if the distinction is important." *Strika vs. Netherlands Ministry of Traffic* (2 Cir. 1950) 185 Fed. 2d 555, 558, 1951 A.M.C. 84, 88.

" * * * We believe the West Virginia (Wrongful Death) Act incorporates the general maritime law of unseaworthiness in death actions involving maritime torts." *Union Carbide Corp. vs. Goett* (4 Cir. 1960) 278 Fed. 2d 319, 1960 A.M.C. 1125, 1130.

And this very Circuit appears to have disposed of the point here under discussion *sub silentio* in the case of *Rawson vs. Calmar Steamship Corp.* (9 Cir. 1962) 304 Fed. 2d 202, 1962 A.M.C. 2153 There a longshoreman's widow brought an action under Washington law against a shipowner on whose vessel her husband was killed, claiming both negligence and unseaworthiness when a winch cable ran wild crushing his head and causing instantaneous death. On the facts, the District Court found for the shipowner, and this Court affirmed.

However, it seems to have been accepted by both Courts that had there been liability, a verdict could have been found for plaintiff on either the ground of negligence or unseaworthiness. (The Washington statute, Revised Code of Washington, 4.20.010, in which state the case arose, provides for wrongful death actions "when the death of a person is caused by the wrongful act, neglect or default", and although it does not appear in the opinion, the briefs demonstrate that this was the remedial statute which authorized the action. Appellant's Brief, p. 24, states that the District Court considered the "unseaworthiness issue under Washington law.")

This Court said, 1962 A.M.C. p. 2157,

"But what of unseaworthiness? Assuming unseaworthiness and causation, the liability is absolute." (The Court cites *Sieracki vs. Seas Shipping Co., supra; Mitchell vs. Trawler Racer; and Petterson vs. Alaska Steamship Co., supra*, all of which we have cited and discussed in support of our position.)

It appears that not only is the breach of the warranty of unseaworthiness a tort, and that this principle has been so held or assumed by the Courts, but there are no meaningful contrary holdings.

Unseaworthiness, being a tort, is thereby actionable under the California Wrongful Death Act.

IV.

THE CALIFORNIA WRONGFUL DEATH ACT ENCOMPASSES ACTIONS BASED ON BREACH OF WARRANTY (ABSENT NEGLIGENCE) BUT SUCH CASES SOUND IN TORT.

Appellees contend that only negligence actions are cognizable

under "the applicable California statute."

This contention is not only not the fact, but Appellees have completely ignored any discussion of the controlling cases and principles of law involved.

Here, again Appellees' entire argument is predicated on their fallacious assertion that Labor Code Section 2803 controls this case, but we have pointed out that this section is neither the remedial statute on which our case proceeded, nor does it have anything to do with the matter at issue. Nor did the District Court consider that our unseaworthiness case involved anything other than an action under C. C. P. Sec. 377.

The Court below acted upon the basis of *Mortenson vs. Pacific Far East Lines* (N.D. Cal. 1956) 148 F. Supp. 71, 1956 A.M.C. 2275. A perusal of *Mortenson* demonstrates that C.C.P. 377 was all that was being construed. The injection of Labor Code Sec. 2803 by Appellees here is an attempt to make an argument that is obviously impossible if directed to C.C.P. Sec. 377.

So far as breach of warranty of fitness being the basis for a death action is concerned, there is no question. That has been decided by the California courts, *Gosling vs. Nichols* (1943) 59 Cal. App. 2d 442, 139 Pac. 2d 86; *Rubino vs. Utah Canning Co.* (1954) 123 Cal. App. 2d 18, 266 Pac. 2d 163, and by this Court itself in *Zellmer vs. Acme Brewing Co.* (9 Cir. 1950) 184 Fed. 2d 941. (See Appellant's Opening Brief, pp. 24-29.)

Appellees have studiously avoided a discussion of these cases and their holdings obviously because there is no answer that can give Appellees comfort. "In California an action for death based upon an implied breach of warranty is within the terms of the California Wrongful Death Statute." *Hinton vs. Republic Aviation Corp.* (S. D. N. Y. 1959) 180 F. Supp. 31, p. 37. *Cf. Greenman vs. Yuba Power Products Inc.* (1963) 59 Cal. 2d 57, 377 Pac. 2d 897.

Woxon vs. County of Kern (1965) 233 A.C.A. 462, 43 Cal. Rep. 481 is not apposite. That case went off on the limitations point. It is apparent that plaintiff there attempted to circumvent the Moratorium legislation enacted by the California Legislature in connection with actions against governmental mental institutions and attempted to plead a tortious death action in terms of contract. The Court held that C. C. P. 377 covered only tort claims. We have already demonstrated that a death action based on unseaworthiness is a tort.

Similarly, *Willey vs. Alaska Packers Assn.* (N.D. Cal. 1926) 9 Fed. 2d 937, 1926 A.M.C. 157 is inapplicable. The holding that the breach of a shipowner's duty to provide maintenance and cure to a seaman was not actionable under C. C. P. 377 could no longer hold under later decisions. The proper remedy is under the Jones Act, 46 U. S. C. Sec. 688. *Cf. Lindgren vs. United States* (1930) 281 U. S. 1930, 1930 A.M.C. 399.

The matter has been definitively settled contrary to *Willey* by the Supreme Court's decision in *Cortes vs. Baltimore Insular Line* (1932) 287 U.S. 367, 1933 A.M.C. 9. There the Court held that a shipowner's failure to provide medical care and cure to a seaman resulting in the latter's death was actionable under the Jones Act, 46 U. S. C. Sec. 688. Shipowner's counsel presented the same argument Appellees make here, 1933 A.M.C. p. 10,

> "The argument is pressed upon us that the care owing to a seaman disabled while in service is an implied term of his contract, and that the statute cannot have had in view the breach of a duty contractual in origin for which he had already a sufficient remedy under existing rules of law."

Mr. Justice Cardozo replied for the Court, 1933 A.M.C., p. 11,

> "We think the origin of the duty is consistent with a remedy *in tort*, since the wrong, if a violation of a contract, is also something more. The duty * * is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort."

Moreover, the entire sweep of modern legal expression favors the construction of breaches of implied warranty as causes sounding in tort, or something more, namely, an "enterprise Liability" where the liability of the supplier is "strict" and may be an entitely new cause of action, neither tort nor contract, but still actionable where death occurs under the appropriate wrongful

death Act. *Cf. Santor vs. A & M Karagheusian Inc.* (1965) 44 N. J. 52, 207 A. 2d 305.

Montgomery vs. Goodyear Tire & Rubber Co. (S.D. N.Y. 1964) 231 F. Supp. 447, was an action for wrongful death brought under the Death on the High Seas Act where the offending instrumentality was an alleged faulty blimp, the complaint being framed in terms of both negligence and breach of implied warranty of fitness. The Court says, 231 F. Supp. 447, p. 451,

> " * * * We choose to examine the particular facts upon which the claim rests and so determine whether there was in truth a breach of implied warranty or negligent manufacture.

The Court continues, p. 453,

> "Section I of the Death on the High Seas Act does not encompass negligence alone, for a breach of warranty is as much a breach of duty as it is a negligent act. * * *

These further pervasive comments appear, p. 454

> "Moreover, the recent trend in personal injury and death cases based on warranty has been to treat the action as one in the nature of tort, ignoring contract considerations. * * * An action based on breach of implied warranty will lie under the Death on the High Seas Act."

Other recent cases adhering to the same views: *Weinstein vs. Eastern Airlines* (3 Cir. 1963) 316 Fed. 2d 758, cert.den. 375 *U. S.* 940; *Middleton vs. United Aircraft Corp.* (S.D. N.Y. 1960) 204 F. Supp. 856; *George vs. Douglas Aircraft Co. Inc.* (2 Cir. 1964) 332 Fed. 2d 73; *Goldberg vs. Killsman Instrument Corp.* (1963) 12 N.Y. 2d 432.

The foregoing opinions not only fortify our view that the California Wrongful Death Act supports an action based upon breach of warranty, they give full answer to Appellees' contention to the contrary. (Appellees' Brief, p. 27.)

V.

CONSIDERATIONS WHICH GOVERN A JONES ACT CASE ARE NOT APPLICABLE HERE.

All that can be extracted from the majority opinion in *Gillespie vs. United States Steel Corp.* (1964) 379 U.S. 148, 1965 A.M.C. 1, is that the Supreme Court chose to stand by its earlier decision in *Lindgren vs. United States* (1930) 281 U.S. 1930, 1930 A.M.C. 399, that in the event of a seaman's tortious death in state waters the case was covered by the Jones Act which occupied the field, and the case was to be decided solely on negligence considerations.

The incongruity of this express holding was pointed up by Justice Goldberg in his dissenting opinion, where he noted that an action for the death of a *longshoreman* could be brought under a State Wrongful Death Act on account of unseaworthiness occurring in state waters, and that "seamen and longshoremen currently recover for death on the high seas and injury suffered anywhere due to an unseaworthy vessel." (1965 A.M.C. pp. 14-15).

The relevance of *Gillespie* to our case is its tacit recognition that an action for unseaworthiness could be maintained under the Death on the High Seas Act, 46 U. S. C. Sec. 761 and far from

overruling that act's application to seamen (as Appellees would have it), it confirms it.

Analogous considerations support the conclusion that a state wrongful death act like California's requires a like construction.

Where the construction or application of state law in its maritime features is concerned, federal law controls. Mr. Justice Black expressed the rule in *Pope & Talbot vs. Hawn* (1953) 346 U.S. 406, 409, 1954 A.M.C. 1,

> "His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a *state created remedy for this right, federal maritime law would be controlling.* While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantive admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." (Our emphasis.)

While it has long been true that a longshoreman is a seaman with respect to his right to call upon the protective admiralty doctrine of unseaworthiness, he is not a "seaman" within the *context of the Jones Act.* That statute governs situations of those who are "crew members" in relationship to their employers. It is an employer's liability act, pure and simple.

A longshoreman's remedy for injuries as against his employer is compensation under the Longshoreman's and Harbor Worker's Compensation Act, 33 U. S. C. Secs. 901 *et seq.* But in that area which encompasses *third party liability,* as in the case now before the Court, a longshoreman's substantive rights are determined by the federal maritime law, and this is so whether his claim is based on

negligence, or unseaworthiness, or both. *THE MAX MORRIS* (1890) 137 U. S. 1, *Seas Shipping Company vs. Sieracki, supra.*

The California courts recognize, as of right they must, the supremacy and controlling efficacy of the federal maritime law. *Intagliata vs. Shipowner's and Merchants Towboat Co. Ltd.* (1945) 26 Cal. 2d 365, 159 P. 2d 1.

Reducing the argument to its basic essence we conclude that the state has supplied a remedy, the wrongful death act, by means of which the substantive maritime right of unseaworthiness is applied and enforced.

Dated at San Francisco on January 31, 1966.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VAN H. PINNEY

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